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In the Supreme Court
of the United States

OCTOBER TERM 1968

No. 669

FRANCIS J. IVANCIE,

Petitioner,

v.

ROBERT Y. THORNTON, Attorney General; the CITY OF PORTLAND, OREGON; and ALEXANDER G. BROWN, City Attorney,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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INDEX

	Page
Opinions below	1, 2
Jurisdiction	2
Question presented	2
Constitutional provisions involved	
First Amendment	2
Fourteenth Amendment (Section One)	3
Statement of the case	3
Argument	5
Conclusion	11
Appendix A—Opinion of Supreme Court of the State of Oregon	13
Appendix B—Opinion of the Circuit Court of the State of Oregon for the County of Multnomah	23
Appendix C—Text of Subsection (a) of Section 2-206 of the Charter of the City of Portland	27

CITATIONS

Page

Cases:

Ivancie v. Thornton, 86 Adv. Or. 1221, — P.2d — (1968) 2, 7
Kinnear v. San Francisco, 61 Cal. 2d 341, 392 P.2d 391 (1964) 5
Minielly v. State, 242 Or. 490, 411 P.2d 69 (1966) 5, 10
N.A.A.C.P. v. Button, 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963) 6, 8
Petrie v. Gragson, 374 P.2d 433 (Nev. 1962) 5
Schneider v. State, 308 U.S. 147, 60 S. Ct. 146, 84 L. Ed. 155 (1939) 6, 7
State v. Senner, 92 Ariz. 243, 375 P.2d 728 (1962) 5
Whitney v. Bolin, 85 Ariz. 44, 330 P.2d 1003 (1958) 5
Willis v. City of Fort Worth, 380 S.W.2d 814 (Tex. Civ. App. 1964) 5

Constitution:

Constitution of the United States, First Amendment 2, 4, 5, 6, 7, 8, 10
Constitution of the United States, Fourteenth Amendment 3, 4, 6

Statutes:

28 U.S.C. 1257 (3) 2

Municipal Charter:

Charter of the City of Portland, Section 2-206 (a) 3, 8, 9, 10
Charter of the City of Portland, Section 2-610 ..... 9, 10

Miscellaneous:

Edward C. Banfield and James Q. Wilson, *City Politics* (Cambridge, Mass: Harvard University Press and the M.I.T. Press, 1963) 9

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

The petitioner prays that a Writ of Certiorari be issued to review a judgment, entered July 24, 1968, by the Supreme Court of the State of Oregon.

CITATIONS TO OPINIONS BELOW

The Opinion of the Circuit Court of the State of Oregon for the County of Multnomah (R. p. 18-21) is unreported and is printed in Appendix B hereto, *infra*, p. 23, and at pages 18-20 of the Record. The

Opinion of the Supreme Court of the State of Oregon is reported at 80 Advance Oregon 1221 and is printed in Appendix A hereto, *infra*, p. 13, and at page 30 of the Record.

JURISDICTION

The judgment of the Supreme Court of the State of Oregon was entered July 24, 1968 (R. p. 26). There was no petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

The question presented by this Petition is whether the First Amendment of the Constitution of the United States is violated by a charter provision of an incorporated city which provides for dismissal from office of an elected or other city official if such official, during his term of office, becomes a candidate for any lucrative district, county, state or national office.

CONSTITUTIONAL PROVISIONS

First Amendment to the Constitution of the United States:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 1 of the Fourteenth Amendment to the Constitution of the United States:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner is a Commissioner of the City of Portland, Oregon, elected by the people for a term expiring in 1970. He is subject to Section 2-206(a) of the Charter of the City of Portland, which provides in part:[1]

> ". . . A vacancy in office shall occur whenever the mayor, a commissioner or the auditor shall, during his term of office, become a candidate for any lucrative district, county, state or national office elective by the people, or whenever the city attorney or any of his deputies, a municipal judge, the city engineer, the city treasurer, a deputy city treasurer, the purchasing agent, or a member of any city board, or commission who has been appointed by the mayor or the council, becomes a candidate for any lucrative

[1] The full text of Section 2-206(a) of the Charter of the City of Portland is printed in Appendix C, *infra*, p. 27.

district, city, county, state or national office elective by the people. All such vacancies resulting from candidacies shall commence when such person shall file his declaration or acceptance of candidacy with the officer authorized to receive and file the same."

Petitioner filed a suit for declaratory judgment seeking to have such provision declared an unconstitutional violation of his rights under the First and Fourteenth Amendments to the Constitution of the United States (R. pp. 2-5). In such suit, he declared his intention to become a candidate for nomination to the office of Secretary of State of the State of Oregon (Tr. p. 2). The Charter provision in question, if valid, would automatically deprive him of his office of City Commissioner if he in fact became a candidate as intended.

The question whether the Charter provision violates Petitioner's First Amendment rights was raised in his Complaint (R. pp. 2-5) and was the sole question presented for review on appeal in the Supreme Court of the State of Oregon (Appellant's Abstract of Record and Brief, p. 16). It has, in fact, been the sole question in the suit.

The trial court held the Charter provision unconstitutional (R. pp. 18-21) and rendered a Decree accordingly (R. p. 23). Defendants duly appealed to the Supreme Court of Oregon (R. p. 24), which reversed the Decree, holding the Charter provision constitutional (R. pp. 26, 30).

ARGUMENT

Whether a state or a political subdivision thereof can preclude an elected or other official from running for office in any other political forum has never been decided by this Court, although general principles under the First Amendment which appear controlling have been laid out. This problem has come before at least five state courts with divergent analyses and results.[2] The Supreme Court of Oregon in *Minielly* v. *State*, 242 Or. 490, 411 P.2d 69 (1966), reviewed the law carefully and concluded a state statute prohibiting civil service employees from running for elective office was an unconstitutional derogation of First Amendment rights. That decision appears to be perfectly sound.

However, in the instant case the Oregon Court held a similar restriction applying to elected city officials valid. This decision of a federal question appears contrary to the way this Court would probably hold.

No question of the meaning or application of the Charter provision in issue is presented. The language is clear on its face and neither the trial court nor the Supreme Court of Oregon had any question that petitioner will lose his office of City Commissioner if

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[2] *State* v. *Senner*, 92 Ariz. 243, 375 P.2d 728 (1962); *Whitney* v. *Bolin*, 85 Ariz. 44, 330 P.2d 1003 (1958); *Kinnear* v. *San Francisco*, 61 Cal. 2d 341, 392 P.2d 391 (1964); *Petrie* v. *Gragson*, 374 P.2d 433 (Nev. 1962); *Minielly* v. *State*, 242 Or. 490, 411 P.2d 69 (1966); *Willis* v. *City of Fort Worth*, 380 S.W.2d 814 (Tex. Civ. App. 1964).

he becomes a candidate for virtually any non-city elective office.

Freedoms encompassed within the First Amendment are protected from infringement by a state through the Fourteenth Amendment. *Schneider* v. *State*, 308 U.S. 147, 160, 60 S. Ct. 146, 84 L. Ed. 155 (1939). Political freedom is encompassed within the First Amendment. *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963). Clearly, the right to be a candidate for political office is the most fundamental form of political expression.

The threat of losing his office as City Commissioner effectively deterred petitioner from becoming a candidate for nomination for Secretary of State of Oregon. The threat of sanctions was here more potent than the sanctions themselves since petitioner could have become a candidate only if he chose to lose his present office. Cf. *N.A.A.C.P.* v. *Button*, *supra*, 433.

The controlling principle of constitutional law applicable to this case is stated in *N.A.A.C.P.* v. *Button*, *supra*, 438:

> "The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms."

The Supreme Court of Oregon in its opinion does not state what "compelling" interest of the City of Portland is protected by the Charter provision in

question. The Court, at most, finds the matter one of legislative preference. *Ivancie* v. *Thornton*, 86 Adv. Or. 1221, 1226:

> "Separation of city government from state and national party politics is not a new concept. Such separation was widely advocated by political scientists in the years between 1893 and 1950. See Frank Mann Stewart, *A Half Century of Municipal Reform, A History of the National Municipal League* (Univ of Calif Press 1950). Fashions in political science may be trending the other way today, but the choice is one for voters to make.
>
> "We conclude that the wisdom of the charter provision is a political question. The only judicial question is whether the political restrictions are so inconsistent with the First Amendment as to be beyond the power of the voters to enact."

That mere legislative preference will not justify restriction of First Amendment freedoms has long been recognized by this Court:

> "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights." *Schneider* v. *State*, 308 U.S. 147, 161, 60 S. Ct. 146, 84 L. Ed. 155 (1939).

Various nuances important in the interpretation of the First Amendment and of importance in the instant case are reviewed in *N.A.A.C.P.* v. *Button, supra*, 439.

> "In *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461, we said, 'In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action.' Later, in *Bates* v. *Little Rock*, 361 U.S. 516, 524, we said, '[w]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.' Most recently, in *Louisianna ex rel. Gremillion* v. *N.A.A.C.P.*, 366 U.S. 293, 297, we reaffirmed this principle: '. . . regulatory measures . . . no matter how sophisticated cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights.' "

The City of Portland attempted to rationalize the Charter provision in several ways (Appellants' Abstract of Record and Brief): (1) protection of Portland's non-partisan form of municipal government; (2) minimization of opportunity to misuse the power of office; (3) guarantee of right of electors to elect a successor speedily; (4) guarantee a full-time devotion to duties; and (5) the provision is divisible and, as applied to petitioner, relates to a class of persons few in number.

There is no showing that allowing petitioner to

run for a salaried office elective by the people will impair the non-partisan governmental system of the City of Portland. If this were the true purpose of the Charter provision, it clearly is overbroad. It prohibits candidacy for non-partisan office and candidacy as an independent as well as partisan candidacy.

The argument of the City of Portland regarding minimization of opportunity to misuse the power of office is somewhat vague and theoretical. The Oregon Court recognized this fundamentally as an attack on democratic government in general. *Ivancie* v. *Thornton, supra,* 1226.

The argument respecting guarantee of the right of the electorate to elect a successor speedily is obviously a rationalization rather than a purpose. It apparently was not felt necessary to provide in the Charter for "speedy" election of a successor if the office becomes vacant for any reason other than political candidacy of the incumbent. Moreover, candidacy (especially in the primaries as in the instant case) is a long way from election. Indeed, the non-partisan municipal officeholder is likely to lose in a statewide politically partisan election.[3]

Unquestionably, the City has a bona fide interest in requiring full-time devotion to duty. It does so directly and properly as follows:

> "All officers and employees receiving pay from this City for full-time work shall devote

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[3] Edward C. Banfield and James Q. Wilson, *City Politics* (Cambridge, Mass: Harvard University Press and the M.I.T. Press, 1963) p. 156.

> their time during business or duty hours to the interest of the City, except when excused as in this Charter provided." Charter Section 2-610.

Petitioner clearly could be removed from office for violation of that provision. He is barred by Charter Section 2-206(a) from candidacy on his own time as well as on City time. Moreover, the provision is not against campaigning but against candidacy.

Whether or not under proper Constitutional analysis Section 2-206(a) of the Charter is divisible, the entire scheme should be examined to determine its intention and effect. City officials, other than the elected officials, some 200 in number, are prohibited from candidacy for any office including the city offices. The power of the state or a subdivision thereof cannot be used to deter or deny First Amendment rights simply because the number of persons whose rights are violated is small. The First Amendment applies as much to an individual as a large group.

Read from its four corners, Section 2-206(a) of the Charter of the City of Portland is plainly and simply an attempt by the City to keep its elected and appointed officials captive and prohibit them from exercising their rights as citizens to run for office. It is contrary to the principles enunciated by this Court for the protection of First Amendment freedoms.

The Supreme Court of Oregon did not state what compelling governmental interests require the restriction of Petitioner's First Amendment freedom. It stated the case was different from *Minielly* v. *State*,

supra, but did not say why the cases are different. Certainly the political rights of an elected official are at least as important as those of a civil servant. The cases appear wholly inharmonious. The importance of defining what restrictions of political freedom may be imposed upon an elected official justifies review by this Court.

CONCLUSION

The right to run for elective office is at least as important to a free society as the right to vote. In this case the City of Portland has narrowly restricted that right. The Supreme Court of Oregon has countenanced the restriction. The restriction flies in the face of fundamental principles laid down by this Court. A writ of certiorari should issue to protect important First Amendment rights.

Respectfully submitted,

FLOYD A. FREDRICKSON
Attorney for Petitioner

APPENDIX "A"

IN THE SUPREME COURT OF THE STATE OF OREGON

IN BANC

Francis J. Ivancie,

Respondent,

v.

Robert Y. Thornton, Attorney General; the City of Portland, Oregon; and Alexander G. Brown, City Attorney,

Appellants.

* * * * * *

Appeal from Circuit Court, Multnomah County.
Robert E. Jones, Judge.
Argued and submitted June 3, 1968.
Malcolm J. Montague and Oliver I. Norville, Portland, argued the cause for appellants. With them on the brief were Williams, Montague, Stark and Thorpe, and Alexander G. Brown, City Attorney, Portland.
Nathan Heath, Portland, argued the cause for respondent. With him on the brief were Gray, Fredrickson & Health, Portland.
Before Perry, Chief Justice, and McAllister, Sloan, O'Connell, Goodwin, Denecke, and Holman, Justices.
GOODWIN, J.

Reversed.
GOODWIN, J.

Plaintiff, an elected city commissioner holding office in Portland, brought declaratory proceedings to

have Section 2-206(a) of the Portland city charter declared unconstitutional. The trial court held the section unconstitutional on the ground that it could not be distinguished from a statute held unconstitutional in *Minielly* v. *State*, 242 Or 490, 411 P2d 69 (1966). The city appeals.

The charter provision, adopted by the voters of Portland in an election on May 18, 1934, as a part of the home-rule power reserved to cities by Oregon Constitution, Art XI, § 2, and Art IV, § 1a, reads as follows:

> ". . . A vacancy in office shall occur whenever the mayor, a commissioner or the auditor shall, during his term of office, become a candidate for any lucrative district, county, state or national office elective by the people, or whenever the city attorney or any of his deputies, a municipal judge, the city engineer, the city treasurer, a deputy city treasurer, the purchasing agent, or a member of any city board, or commission who has been appointed by the mayor or the council, becomes a candidate for any lucrative district, city, county, state or national office elective by the people. All such vacancies resulting from candidacies shall commence when such person shall file his declaration or acceptance of candidacy with the officer authorized to receive and file the same." Section 2-206(a). Charter of the City of Portland (1967).

The *Minielly* decision struck down ORS 241.520 and 241.990(3), which denied to all civil-service employees and to all persons on the civil-service eligibil-

ity lists in certain counties the right to "be a candidate for popular election to any public office . . . ." ORS 241.520. The plaintiff was a deputy sheriff who desired to file for the office of sheriff. We held the statute defective for overbreadth in restricting First Amendment rights.

Reviewing a similar statute in a case which involved a nurse in a public hospital who was discharged for carrying recall petitions contrary to a local ordinance, the California Supreme Court said: "The overbreadth of the statute lies in the wide swath of its prohibition of employee participation in a number and variety of elections . . . ." *Bagley* v. *Washington Township Hospital Dist.*, 65 Cal 2d 499, 509, 421 P2d 409, 416, 55 Cal Rptr 401, 408 (1966).

Any forced surrender of First Amendment rights is closely scrutinized for unconstitutionality. *Minielly* v. *State, supra.* And see Note, 61 Harv. L. Rev. 1208 (1948). Political activity is a First Amendment right. *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963). Termination of employment is an effective deterrent to political activity. *Minielly* v. *State, supra.*

The *Minielly* case dealt with a statute that was conspicuously broad. It purported to bar all government employees from all avenues to elective office. The breadth of the statute in the *Minielly* case could not be justified by any legitimate governmental purpose. We said there that if the intent of the statute had been merely to preserve harmony in certain gov-

ernmental departments by requiring specified employees to resign if they wanted to run against an employer, the statute should have said so. See *Fort* v. *Civil Service Commission*, 61 Cal. 2d 331, 392 P.2d 385, 38 Cal. Rptr. 625 (1964). The statute struck down in *Minielly* barred too many persons from too many constitutionally protected activities without the showing of a compensating governmental purpose to be served. We observed in *Minielly, however*, that circumstances could justify a limitation upon the political activity of certain types of officers and employees if the limitation were narrowly drawn and if it were imposed solely to accomplish a justifiable governmental purpose.

In this case, it is argued that the two operative classifications of Section 2-206(a) cannot be severed, and that the clause purporting to eliminate a class of appointive officers from political life, in or out of city government, is unconstitutional for overbreadth, pulling the whole section down with it even if the remainder of the section is constitutional. We need not decide the validity of the clause relating to subordinates. At common law, legislation must be treated as severable whenever possible, so that the constitutional portions can be sustained.[1] See *Dilger* v. *School*

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[1] For acts of the Legislative Assembly, this rule has been codified as follows:

ORS 174.040. "It shall be considered that it is the legislative intent, in the enactment of any statute, that if any part of the statute is held unconstitutional, the remaining parts shall remain in force unless:

"(1) The statute provides otherwise;

"(2) The remaining parts are so essentially and in-

District 24CJ, 222 Or 108, 119, 352 P2d 564 (1960). The charter provision relating to subordinates is clearly severable from the one relating to elective officials.[2]

When the clause relating to the appointive subordinates is severed, the charter limitation is narrowly focused upon the incumbent holders of three named offices. The provision can withstand constitutional challenge, however, only if its effect upon freedom of expression goes no further than necessary to accomplish a reasonable governmental purpose. To justify any restrictions upon political freedom, the purpose of the law must be to protect a substantial governmental interest. Thus, if the purpose of the law is to remedy some substantive evil, the city must show what the evil is and how the restriction can reasonably be expected to remedy it. In defense of its charter provision, the city has relied upon a number of factors, including its scheme of government and the historical background of the questioned amendment.

The people of Portland, by home-rule charter amendments in 1913, reaffirmed an earlier charter

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separably connected with and dependent upon the unconstitutional part that it is apparent that the remaining parts would not have been enacted without the unconstitutional part; or

"(3) The remaining parts, standing alone, are incomplete and incapable of being executed in accordance with the legislative intent."

[2] A rule against severability said to apply to First Amendment cases because of the evil of prior restraint in censorship has no application in a case of this kind where censorship in general is not a threat. Those affected by the ordinance are specifically designated. Cf., *Thornhill* v. *Alabama*, 310 U.S. 88, 60 S. Ct. 736, 84 L. Ed. 1093 (1940).

which had created a form of city government in which commissioners would exercise both legislative and executive powers. Thus, today, while sitting with the mayor in the legislative deliberations of the city council, the commissioners enact ordinances; at the same time, in their administrative capacity, the individual commissioners make executive decisions and respectively manage the specific areas of city activity assigned to their executive jurisdiction. All city commissioners, the mayor, and the auditor, designated in the charter provision under examination, are required by Section 3-105 of the Charter of the City of Portland to be elected by the voters of the city on a nonpartisan ballot. They must execute an oath to the effect that they are not supported by any political party.

Newspaper editorials offered as exhibits in this case suggest that the voters of the city of Portland in 1934 wanted their city officials to use their nonpartisan positions of legislative and administrative power exclusively to serve the city. The exhibits suggest also that the voters may have deemed it undesirable for their city officers, while on the job, to seek partisan political influence or to collect political campaign funds with which to launch careers in state and national politics. Indeed, from the use of the word "lucrative," the voters apparently deemed it advisable for their city officials to resign before seeking any other salaried office, including the nonpartisan statewide offices of judge or superintendent of public instruction. While such a provision is broad in its ef-

fect, it is not necessarily overbroad in terms of its purpose.

The city argues that potential conflicts of interest could confront a city commissioner in passing upon licenses, zoning matters, and contracts in his capacity as a commissioner at the same time he was soliciting campaign funds in order to run for an elective state office. While similar arguments can be advanced for restricting all political activity by officeholders, and thus can be reduced to an attack on democratic government in general, we cannot say that the voters of the city had no right to consider conflicts-of-interest problems as suggested by the newspaper editorials favoring the measure.

The issue before the voters was widely debated. The Portland City Club, for example, in a well-reasoned report, opposed the measure as unwise, unnecessary, and unworthy of a democratic society.

Separation of city government from state and national party politics is not a new concept. Such separation was widely advocated by political scientists in the years between 1893 and 1950. See Frank Mann Stewart, *A Half Century of Municipal Reform, A History of the National Municipal League* (Univ. of Calif. Press 1950). Fashions in political science may be trending the other way today, but the choice is one for voters to make.

We conclude that the wisdom of the charter provision is a political question. The only judicial question is whether the political restrictions are so incon-

sistent with the First Amendment as to be beyond the power of the voters to enact.

In the cases striking down statutes for infringing upon First Amendment rights, it is now settled that government may not, by taxes, licenses, punishment, or withholding of benefits, attempt to regulate speech, assembly, and political activity, except within extremely narrow limits. See *Smith* v. *California*, 361 U.S. 147, 154, 80 S. Ct. 215, 4 L. Ed. 2d 205 (1959); *Speiser* v. *Randall*, 357 U.S. 513, 526, 78 S. Ct. 1332, 2 L. Ed. 1460 (1958); *Vogel* v. *County of Los Angeles*, — Cal. 2d —, 434 P.2d 961, 64 Cal. Rptr. 409 (1967). If a challenged statute is so broad, or so vague, that it creates a danger that it will impede the legitimate exercise of protected rights beyond the reasonable needs of the governmental interest sought to be protected, the statute is unconstitutional. *Thornhill* v. *Alabama*, 310 U.S. 88, 60 S. Ct. 736, 84 L. Ed. 1093 (1940).

One indicator of defective vagueness is power granted to an executive officer selectively to enforce the law or stay enforcement more or less at his discretion. See Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67, 88 (1960). There is, of course, no such problem in the provision under scrutiny.

Another indicator of repugnancy, when a statute is tested against the First Amendment, is the tendency of the threat of enforcement of the statute to inhibit the free exercise of protected rights on the

part of persons who, although not directly affected, might deem themselves to be threatened by the statute. See, e.g., *N.A.A.C.P.* v. *Button, supra; Thornhill* v. *Alabama, supra.* And see Note, 61 Harv. L. Rev., *supra* at 1208. There is in the case at bar no such problem as far as the mayor, auditor, and commissioners are concerned. The requirements of the statute are definite and certain; the persons and offices regulated are narrowly defined.

Another common vice of statutes that impinge upon free expression, failure to give adequate warning, is obviously absent in the case at bar. See *Lanzetta* v. *New Jersey,* 306 U.S. 451, 59 S. Ct. 618, 83 L. Ed. 888 (1939).

The only colorable ground for attack upon the challenged charter provision is that the city seeks to exact an onerous condition upon the exercise of a First Amendment right: the mayor, the commissioner, or the auditor must remove himself from the city payroll when he becomes a candidate for partisan or other office outside the system of city government. This condition, which a candidate voluntarily accepts when seeking city office, must be weighed against the reasonableness of the desire of the local voters to keep certain of their city hall officials out of state and national politics while they are drawing a city salary.

In the original Oregon Constitution, judges of the supreme court and circuit court were required to forswear political ambition outside the judiciary. See

Oregon Constitution, Art. VII (Orig.), §§ 10 and 21. The constitutional oath was retained by amendments in 1910, but was limited to judges of the supreme court. A statutory oath applies to circuit judges. See *Ekwall* v. *Stadelman*, 146 Or. 439, 30 P.2d 1037 (1934). We believe the situation of the mayor, auditor, and commissioners under the Portland charter is more nearly analogous to the undertaking of a judge to remain aloof from non-judicial politics than to the situation contemplated in the statute which was stricken in the *Minielly* case.

The Portland charter provision, while perhaps not a common one, is not unique. In Philadelphia, a much more restrictive provision has been twice before the Pennsylvania courts, apparently without the question of unconstitutionality being suggested. There no officer or employee of the city can run for any office, including city office, except for his own re-election, without resigning. See *Mayor* v. *Hemphill*, 411 Pa. 1, 190 A.2d 444 (1963), and related cases discussed therein.

Whether or not as a matter of political theory or preference we might agree with the voters of the city of Portland, we do not believe that their charter amendment calls for judicial intervention. Unconstitutionality is not to be presumed nor lightly to be declared. Standing alone, the provision relating to the major, auditor, and commissioners is constitutional.

Reversed.

APPENDIX "B"

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH

FRANCIS J. IVANCIE, *Plaintiff,*

v.

ROBERT Y. THORNTON, Attorney General, the CITY OF PORTLAND, OREGON, and ALEXANDER G. BROWN, City Attorney, *Defendants.*

No. 330 800

OPINION

This is a suit for a declaratory judgment. Plaintiff is an elected Commissioner of the City of Portland, seeking to have a portion of the City Charter declared unconstitutional. The plaintiff has declared in open court that he absolutely intends to run for the position of Secretary of State for the State of Oregon. Subsection (a) of Section 2-206 of the Charter provides:

> "A vacancy in office shall exist when the mayor, a commissioner or the auditor fails to qualify by taking the oath and filing the bond prior to January 1 of the year following his election, or within ten days after notice of appointment to fill a vacancy, or when any officer, or employee dies, resigns, is removed from office, is convicted of a felony, is judicially declared to be mentally ill, is judicially convicted of corruption, malfeasance or delinquency in office, or forfeits his office under specific provisions of this charter. A vacancy in the office shall occur whenever

> (1) the mayor, a commissioner or the auditor shall, during his term of office, become a candidate for any lucrative district, county, state or national office elective by the people, or whenever (2) the city attorney or any of his deputies, a municipal judge, the city engineer, the city treasurer, a deputy city treasurer, the purchasing agent, or (3) a member of any city board, or commission who has been appointed by the mayor or the council, becomes a candidate for any lucrative district, city, county, state or national office elective by the people. All such vacancies resulting from candidacies shall commence when such person shall file his declaration or acceptance of candidacy with the officer authorized to receive and file the same." [Bracketed numbers added to show classifications covered by provision.]

He asserts, therefore, that this Charter provision deprives him of his right of freedom of expression, equal privileges and immunities, equal protection of the law, and also deprives him of liberty without due process of law.

In seeking to void this Charter provision, the plaintiff relies primarily on *Minielly* v. *State of Oregon, et al*, 242 Or. 490, 411 P.2d 69 (1966). In that case, a deputy sheriff, a civil service employee, announced his intention to become a candidate for sheriff at the next election. Certain state statutes prohibited civil service employees from becoming candidates for public office. The Court held that running for public office is one of the means of political expres-

sion which is protected by the First Amendment. After reviewing recent U. S. Supreme Court and state Court decisions involving First Amendment rights, the Court declared, the statutes unconstitutional for overbreadth, stating at page 507:

> "It is apparent from the cases heretofore discussed in this opinion that a revolution has occurred in the law relative to the state's power to limit federal First Amendment rights. Thirty years ago the statutes now under consideration would have been held to be constitutional, particularly as applied to the factual situation in the present case. This is no longer possible in view of the intervening decisions of the United States Supreme Court. We hold the statutes unconstitutional because of overbreadth."

The Court in the *Minielly* case, however, stated that the government has the authority without violating the Constitution to make and enforce regulations for public employment which bear a reasonable relation to the promotion of efficiency, integrity and discipline of the public service, and which are not arbitrary or discriminatory.

Is there a compelling public interest for this restrictive Charter provision? Does it promote efficiency, integrity and discipline of public service?

This Court finds there is no compelling public interest to be served by this restriction. It is a political reality that our highest caliber public servants most often rise to eminence and national importance only after serving at the lower steps of political office.

We have seen in recent years young, aggressive men of great intellect and integrity take these steps from local representation to state representation, to national representation while still discharging the duties and performing effectively in the lower positions. It has been common for a Secretary of State to run for Governor, for a Congressman to run for the Senate, and, of course, a Governor to run for President. If these responsible positions can be fulfilled while this political activity is being undertaken, how can we single out a Portland City Commissioner and restrict him from undertaking election to a state office? It seems to this Court that this is a clear violation of equal rights under the law as well as an unreasonable restriction on freedom of expression.

The Act is discriminatory and arbitrary and serves no public purpose. Local government is becoming increasingly more important with our expanding metropolitan problems. If we are to attract the most capable men to fill these positions of leadership in local government, the positions cannot and should not be political dead-ends.

Dated this 17th day of November, 1967.

ROBERT E. JONES
Circuit Court Judge

APPENDIX "C"

Subsection (a) of Section 2-206 of the Charter of the city of Portland:

"Section 2-206. Vacancies in Office. Filling of Vacancies.

"(a) A vacancy in office shall exist when the mayor, a commissioner or the auditor fails to qualify by taking the oath and filing the bond prior to January 1 of the year following his election, or within ten days after notice of appointment to fill a vacancy, or when any officer or employee dies, resigns, is removed from office, is convicted of a felony, is judicially declared to be mentally ill, is judicially convicted of corruption, malfeasance or delinquency in office, or forfeits his office under specific provisions of this charter. A vacancy in office shall occur whenever the mayor, a commissioner or the auditor shall, during his term of office, become a candidate for any lucrative district, county, state or national office elective by the people, or whenever the city attorney or any of his deputies, a municipal judge, the city engineer, the city treasurer, a deputy city treasurer, the purchasing agent, or a member of any city board, or commission who has been appointed by the major or the council, becomes a candidate for any lucrative district, city, county, state or national office elective by the people. All such vacancies resulting from candidacies shall commence when such persons shall file his declaration or acceptance of candidacy with the officer authorized to receive and file the same."